No. 11,589

United States Circuit Court of Appeals

For the Ninth Circuit

VINCENT BRUNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the Northern District of California, Southern Division

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Brief for Appellant

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JURISDICTIONAL STATEMENT

Appellant, Vincent Bruno, was indicted for violating the provisions of the Harrison Narcotic Act, 26 U.S.C. 2553 and 2557, and the Jones-Miller Act, 21 U.S.C. 174 (R. 2-3).* The indictment was in two counts, the first

*Reference to the Transcript of Record are preceded by the letter "R"; references to the Supplemental Record are preceded by the letters "SR."

charging appellant with selling heroin "not in or from the original stamped package," contrary to the Harrison Narcotic Act, and the second charging appellant with fraudulently and knowingly concealing and facilitating the concealment of the lot of heroin described in the first count, contrary to the provisions of the Jones-Miller Act (R. 2-3).

Appellant pleaded "not guilty" to the indictment (R. 5-6), and after a trial by jury, was convicted on both counts (R. 12-13). His motions for a new trial and in arrest of judgment were denied (R. 6-8, 15), and he was sentenced to a term of five years in a Federal prison on count one of the indictment and to a term of ten years and to pay a fine of $5,000 on count two, the sentences on the two counts to run consecutively (R. 13-14).

The District Court had jurisdiction of this action by virtue of provisions of 28 U.S.C.A. sec. 41, subd. 2, which provides that the District Courts shall have original jurisdiction "of all crimes and offenses cognizable under the authority of the United States," and by virtue of the following Amendment—Six—to the Constitution of the United States:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

This Court has jurisdiction to review the judgment by virtue of 28 U.S.C.A. sec. 225, which provides: "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions,—First in the District Court, in all cases save where a direct review of the

decision may be had in the Supreme Court, under section 345 of this Title."

The pleadings on which jurisdiction is based are the Indictment (R. 2-3) and the Plea of Not Guilty (R. 5-6).

STATEMENT OF FACTS

About 10:30 P.M. of August 20, 1945, a special Government employee by the name of Lieberman met with appellant at the Stardust Bar on the corner of Larkin and Sutter Streets, San Francisco, California (SR. 44-45). According to Lieberman's testimony he and appellant went to the mens' room on the premises and there appellant sold him a bindle of heroin for $50.00 (SR. 45-46).

Before meeting with appellant Lieberman had been searched for narcotics by a Government agent named Grady and given two $50.00 bills (SR. 27). After the alleged purchase, Lieberman again met with Grady about a block from the Stardust Bar where he handed Grady a bindle of heroin and returned one of the $50.00 bills previously given him (SR. 30).

Appellant, while admitting meeting with Lieberman on the night in question, denied that he sold Lieberman any narcotics (SR. 60-63). The jury found appellant guilty on both counts (SR. 86), and he was sentenced by the Court to five years imprisonment on the first count and to ten years imprisonment and to pay a fine of $5,000 on the second count, the sentences to run consecutively (R. 13-14).

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON

1. That appellant was twice put in jeopardy for the same offense.

ARGUMENT

The Proof at the Trial Below Established Only One Offense and the Court Below Consequently Erred in Sentencing Appellant Twice.

The Constitutional principle that no one should be put in jeopardy twice for the same offense "was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Ex parte Lange,* 85 U.S. 163, 173, 21 L.Ed. 872, 878. Since a criminal is twice punished for the same offense when the evidence necessary to prove either offense will necessarily establish the other also (*Schroeder v. United States,* 7 F.(2d) 60 (C.C.A. 2); *Copperthwaite v. United States,* 37 F.(2d) 846 (C.C.A. 6); *Woods v. United States,* 26 F.(2d) 63 (C.C.A. 8)), and since, in the case at bar, the evidence under the first count necessarily proved the crime charged in the second count, appellant was twice punished for the same offense contrary to the provisions of the Fifth Amendment to the Constitution.

The first count of the indictment charges appellant with unlawfully selling, dispensing and distributing "not in or from the original stamped package, a certain quantity of * * * heroin," (R. 2), contrary to the provisions of the Harrison Narcotic Act, 26 U.S.C. 2553 and 2557. The pertinent provisions of that Act are as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *"

The second count charges "That at the time and place mentioned in the first count * * * defendant fraudulently and knowingly did conceal and facilitate the concealment of said * * * lot of heroin * * *," contrary to the Jones-Miller Act, 21 U.S.C. 174, which provides:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The sole factual showing at the trial below in support of the two convictions was the testimony of Lieberman that on the night in question appellant sold him a bindle of heroin. There was not a word of testimony to show,

as alleged in the second count, that appellant "fraudulently and knowingly did conceal and facilitate the concealment of the heroin." Indeed, the only possession shown at all was the possession appellant had for the purpose of the sale. The Government's case on the second count, therefore, rests solely on the statutory presumption that possession of the narcotic drug, without more, is sufficient evidence on which to base a conviction.

But this presumption, it will be observed, relies solely and entirely on one of the essential facts necessary for a conviction under the first count. The first count charges that appellant "did sell, dispense, and distribute" a certain lot of heroin not in or from the original stamped package. Obviously, to have sold, dispensed and distributed the heroin in question, appellant must have had possession of the drug. And since this possession, without more, is sufficient for conviction under the second count (because of the statutory presumption contained in the Jones-Miller Act), the Government, by proving a violation of the Harrison Narcotic Act, automatically proves a violation of the Jones-Miller Act. The one necessarily follows from the other. As a result, one offense leads unjustifiably to two sentences.

But before proceeding further with this analysis and before examining the authorities in support of appellant's contention, two other problems, nearly-identical with the one here, should be distinguished. The first of these nearly-identical problems is the familiar one of when a defendant is being twice *tried* for the same offense. The confusion between this problem and the one considered in this brief arises principally because the tests used in solving the

problems are almost alike. "The test in determining whether more than one offense is charged in an indictment or denounced by statute is whether or not each proposed offense requires proof of some fact which the others do not." *Dimenza v. Johnston,* 130 F.(2d) 465, 466 (C.C.A. 9); cf. *Michener v. Johnston,* 141 F.(2d) 171, footnote 3 (C.C.A. 9). As pointed out above, the test in determining whether a defendant has been twice sentenced for the same offense is whether the evidence necessary to prove either offense will necessarily establish the other also.

Appellant, however, does not contend that he was twice tried for the same offense. He concedes that the indictment sets out two separate offenses; for had the Government been able to show the actual concealment of the heroin prior to the sale as well as the sale itself, two separate offenses would have been established. And since the indictment charged facts which, *if proved,* would have constituted two separate offenses, the indictment was sufficient and appellant was not tried twice for the same offense. *Gargano v. United States,* 140 F.(2d) 118 (C.C.A. 9); *Silverman v. United States,* 59 F.(2d) 636 (C.C.A. 1), certiorari denied 287 U.S. 640. But such proof was not produced. The problem, therefore, is not one of the sufficiency of the indictment but rather whether two separate offenses were sufficiently *proved* to warrant two sentences.

The second nearly-identical problem that must be distinguished from the question here is the problem whether two sentences may be imposed where one offense contains all the necessary elements of another. See, for example, *Michener v. United States,* 157 F.(2d) 616 (C.C.A. 8), reversed .... U.S. ...., 91 L.Ed. Ad. Op. 1213 (June 2,

1947), where the Court considered the problem whether a defendant who has been convicted of making a plate to be used in counterfeiting Federal Reserve Notes may be sentenced also for having the same plate in his possession, the question arising because in making the plate the defendant must necessarily have had the possession of it. The cases treating this and similar problems have been numerous but are not in point here. The problem facing this Court is not whether a second offense has been shown within the facts of the first offense, but rather whether *one* of the facts of the first offense, insufficient in itself to prove the second offense, can be made to constitute an entire crime by means of a statutory presumption alone. In other words, the Government in proving the first crime did not show that appellant had concealed the heroin; it proved only a sale and delivery and then argued, impliedly, that since the sale and delivery required possession of the heroin and possession alone was sufficient under the presumption in the second count, the sale and delivery proved the concealment. It is to be noted that in the *Michener* and similar cases *all* the facts necessary to prove the second crime were shown in proving the first offense.

A careful search of the authorities has revealed only two cases treating the identical question at hand and both, one directly and the other indirectly, condemned the imposition of double sentence. These cases are *Copperthwaite v. United States,* 37 F.(2d) 846 (C.C.A. 6) and *Ex parte Thomas,* 55 F. Supp. 30 (E.D. Ky.).

The *Copperthwaite* case is squarely in point. There, as here:

"Appellants were convicted under both counts of an indictment, the first of which charged the purchase and sale of unstamped morphine in violation of the Harrison Anti-Narcotic Act (Sec. 692, Tit. 26, U.S.C.A.)*, and the second of which charged, as of the same time and place, the buying and selling of the same amounts of morphine which they knew had been unlawfully imported into the United States, thus constituting an offense under the Narcotic Import Statute (Sec. 174, Tit. 21, U.S.C.A.). They were sentenced to five years imprisonment under the first count and ten years under the second count—the two terms to be concurrent" (at 847).

With respect to the question of double punishment, the Court said:

"* * * The entire proof in this case consisted of evidence that the defendants agreed to furnish and sell morphine to a purchaser and thereafter did have it (unstamped) in their possession and deliver it to him. By virtue of the presumption declared in the Harrison Act, this possession tended to show the forbidden purchase; and the same possession also tended —by virtue of the presumption declared in the Import Act—to show unlawful importation and defendants' knowledge. *In such case the government may punish for either offense, but we think the supporting evidence does not so materially vary as to justify two punishments, merely because two inferences are attached by different statutes to the same evidential basis.*" (At 847-848. Emphasis supplied.)

In *Ex parte Thomas, supra,* the Court considered the same question and recognized that if the Government

*Now section 2553 of the same title.

relied solely on the statutory presumption to prove the second offense, the defendant was twice placed in jeopardy. The Court in that case, however, found that the record did not clearly show that the Government relied on the presumption contained in the statute and accordingly held that double jeopardy was not shown.

Furthermore, the language of the Jones-Miller Act, itself, indicates that Congress did not intend the presumption to apply where the defendant was on trial for an offense under another act. The statute plainly provides that the presumption is to apply "whenever [the defendant is] on trial for a violation of *this section.*"* Had Congress intended no limitation on the application of the presumption, there would have been no need for including the quoted words in the act; the same result could then have been accomplished by providing, simply, that "*whenever* the defendant is shown to have or to have had possession of the narcotic drug, such possession should be deemed sufficient evidence to authorize conviction." "In view of the rule, that a legislative body is presumed to have used no superfluous words in a statute * * *, and the rule that 'effect shall be given to every clause and part of a statute'," (*Pacific Gas & Electric Co. v. Securities & Exchange Commission,* 127 F.(2d) 378, 382 (C.C.A. 9)), the presumption was improperly applied in this case.

Appellant, therefore, was twice placed in jeopardy for the same offense contrary to the provisions of the Constitution and the intention of Congress. The court below, therefore, erred in sentencing appellant twice. The second

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*Emphasis supplied.

of those two sentences, it is respectfully submitted, should be set aside; first, because the Government had not fulfilled its burden of establishing the second offense, and secondly, because the court in imposing sentence on the first of the two offenses "exhausted its power to sentence, and the sentence on count two was void." *Holbrook v. Hunter,* 149 F.(2d) 230, 232 (C.C.A. 10).

CONCLUSION

The court below erred in imposing sentence on count two of the indictment. The judgment of the court below, therefore, should be modified by striking the judgment on the second count.

Dated: August 11, 1947.

Respectfully submitted,

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